

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ERNEST C. FLENTALL,

Plaintiff,

Civil Action No. 10-13353

v.

District Judge Avern Cohn
Magistrate Judge Laurie J. Michelson

MOREY, et al.,

Defendants.

/

**REPORT AND RECOMMENDATION TO DENY AS MOOT MOTION TO DISMISS OF
DEFENDANTS MOREY, HOLDEN-SELBY, AND WILLIAMS (DKT. 14)**

Recommendation

Plaintiff Ernest C. Flentall, an MDOC inmate proceeding *pro se*, brought this case pursuant to 42 U.S.C. § 1983 alleging that MDOC employees, including Timothy Morey, Kelly Holden-Selby, and Christine Williams (“Defendants”), violated his constitutional rights by taking his legal brief in retaliation for filing a grievance. All pretrial matters have been referred to this Court pursuant to 28 U.S.C. § 636(b)(1)(B). (Dkts. 7, 15.) Because Plaintiff filed an Amended Complaint and Defendants filed a Second Motion to Dismiss, the Court RECOMMENDS that Defendants’ initial motion to dismiss – based on the initial complaint – be DENIED AS MOOT.

Report

Plaintiff filed this suit on August 24, 2010. (Dkt. 1, Compl.) On September 23, 2010, Defendants filed a Motion to Extend Time, asking for 60 additional days to file a dispositive motion in response to Plaintiff’s Complaint. (Dkt. 10.) That same day, Magistrate Judge R. Steven Whalen granted the extension and gave Defendants until November 23, 2010 to file a response. (Dkt. 12.)

In a letter filed with the Court on September 29, 2010, Plaintiff appeared to request a stay and/or leave to amend his Complaint. (Dkt. 13.)

On November 8, 2010, within the extension provided by Magistrate Judge Whalen, Defendants filed a Motion to Dismiss which is presently pending. (Dkt. 14.) A footnote in that Motion provides:

On October 26, 2010, Defendants were served, through counsel, with [Plaintiff's] Amended Complaint. The Amended Complaint, which has not been docketed by the Court as of November 8, 2010, seeks to add an administrative hearing investigator as a defendant. The basis for the claims asserted against the instant defendants is the same in both the original Complaint and the undocketed Amended Complaint.

(Dkt. 14, Defs.' Mot. Dismiss at 1 n.1.)

On November 24, 2010, Plaintiff filed a Response to Defendants' Motion to Dismiss. There, he states:

the [Amended] Complaint is the complaint which should have been addressed by defendant's [sic] because it was properly filed pursuant to Fed. R. Civ. P. 15(a), so Mr. Flentall-El would ask the court to acknowledge the amended complaint and order defendant's [sic] to respond to it, and deny their motion to dismiss because it is out of order.

(Dkt. 15, Pl.'s Resp. to Defs.' Mot. Dismiss at 2.)

On April 19, 2011, this Court entered an Order indicating that it was construing Plaintiff's September 29, 2010, letter request as a motion to amend pursuant to Fed. R. Civ. P. 15(a)(2). (Dkt. 19.) The Court granted the request to amend and directed the Plaintiff to file a copy of the proposed amended complaint he served on Defendants on October 26, 2010, on or before April 29, 2011. (*Id.*) The Defendants were asked to advise the Court whether they would refile their Motion to Dismiss in view of Plaintiff's amended complaint or whether the Court should treat the already-

filed Motion to Dismiss as against the amended complaint. (*Id.*)

Subsequently, Plaintiff filed his Amended Complaint (Dkt. 20), and, as a result, Defendants filed a “Second Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 12(b)(1)” on May 10, 2011. (Dkt. 21.) Accordingly, Defendants’ prior Motion to Dismiss (Dkt. 14) is moot. *See e.g., Jaime v. Wells Fargo Home Mortg., Inc.*, No. 11-10302, 2011 U.S. Dist. LEXIS 37809, at *1 (E.D. Mich. Apr. 7, 2011) (adopting Magistrate Judge’s Report and Recommendation that defendants’ motion to dismiss be denied as moot where the parties agreed to permit an amended complaint); *Williams v. Kelly*, No. 07-10999, 2007 WL 2951303, *1 (E.D. Mich. Oct. 10, 2007) (denying as moot the defendants’ motion to dismiss where the complaint to which it was directed had been superseded by an amended complaint.).

Conclusion

Because Defendants’ November 8, 2010 Motion to Dismiss relates to the original complaint, and Plaintiff has filed an Amended Complaint to which the Defendants have filed a Second Motion to Dismiss, the Court RECOMMENDS that Defendants’ original Motion to Dismiss (Dkt. 14) be DENIED as moot.

Filing Objections To This Report

The parties to this action may object to and seek review of this Report and Recommendation within fourteen (14) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 596 (6th Cir. 2006); *United States v. Sullivan*, 431 F.3d 976, 984 (6th Cir. 2005). The parties are advised that making some objections, but failing to raise others, will not preserve all the objections a party may have to this Report and

Recommendation. *McClanahan v. Comm'r Soc. Sec.*, 474 F.3d 830 (6th Cir. 2006) (internal quotation marks omitted); *Frontier*, 454 F.3d at 596-97. A copy of any objections is to be served upon this magistrate judge. E.D. Mich. LR 72.1(d)(2). Once an objection is filed, a response is due within fourteen (14) days of service, and a reply brief may be filed within seven (7) days of service of the response. E.D. Mich. LR 72.1(d)(3), (4).

s/Laurie J. Michelson
LAURIE J. MICHELSON
UNITED STATES MAGISTRATE JUDGE

Dated: May 13, 2011

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing order was served on the attorneys and/or parties of record by electronic means or U.S. Mail on May 13, 2011.

s/J. Johnson
Deputy Clerk